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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKET SECTION

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Joint Application of AMERICAN AIRLINES, INC. and EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC., SIMMONS AIRLINES, INC., and WINGS WEST AIRLINES, INC. (d/b/a AMERICAN EAGLE) and CANADIAN AIRLINES INTERNATIONAL LTD., and ONTARIO EXPRESS LTD. and TIME AIR INC (d/b/a CANADIAN REGIONAL) and INTER-CANADIAN (1991) INC. under 49 USC §§41308 and 41309 for approval of and antitrust immunity for commercial alliance agreement	Docket OST-95-792-30

COMMENTS OF UNITED AIR LINES, INC.

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Joint Application of AMERICAN AIRLINES, INC. and EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC., SIMMONS AIRLINES, INC., and WINGS WEST AIRLINES, INC. (d/b/a AMERICAN EAGLE) and CANADIAN AIRLINES INTERNATIONAL LTD., and ONTARIO EXPRESS LTD. and TIME AIR INC. (d/b/a CANADIAN REGIONAL) and INTER-CANADIAN (1991) INC. under 49 USC 5541308 and 41309 for approval of and antitrust immunity for commercial alliance agreement	Docket OST-95-792

COMMENTS OF UNITED AIR LINES, INC.

United Air Lines, Inc., submits the following comments relating to the Department's tentative findings and decision in Order 96-5-38 in the above-captioned proceeding:

I. Introduction.

By Order 96-5-38, the Department tentatively approved and granted antitrust immunity to a Commercial Alliance Agreement between American Airlines, Inc. and its regional commuter affiliates ("American"), and Canadian Airlines International, Ltd. and its regional affiliates ("Canadian"). So long as the Department is prepared to approve and grant antitrust immunity on similar terms and conditions to an Alliance Expansion Agreement

being filed today by United and Air Canada,"' United takes no position with respect to the Department's tentative order. On the other hand, if the Department is not prepared to grant identical immunity to an enhanced United/Air Canada alliance, due process and fundamental fairness require the Department to withhold such approval from the American/Canadian alliance pending a comparative proceeding involving both applications.

The Department is now in the process of deciding what opportunities U.S. carriers will have to compete in the transborder market. A decision to extend antitrust immunity to American for its alliance with Canadian, while denying such immunity to United for its alliance with Air Canada, would limit inter-alliance competition in the transborder market and clearly discriminate against United in favor of American. Such discrimination would represent a fundamental disregard of United's due process rights.

[1/] In its initial comments on the joint application of American and Canadian filed in this docket on February 6, 1996, United urged the Department to dismiss the application because the new Air Transport Agreement with Canada limits U.S. carriers' ability freely to initiate new transborder services until February of 1997, in the case of Montreal and Vancouver, and February of 1998, in the case of Toronto. Despite these limitations, the Department has tentatively decided to immunize the American/Canadian alliance from the antitrust laws. Because of the Department's unprecedented action, United has no choice but to seek antitrust immunity for its alliance with Air Canada in order to be able to compete effectively with the American/Canadian alliance in transborder markets, notwithstanding United's initial position that a grant of such immunity at this time would be premature under previous Department policy and precedent.

II. The Department's Policy Of Promoting Inter-Alliance Competition Compels Approval Of Both The American/Canadian And United/Air Canada Alliances.

In tentatively approving the American/Canadian alliance, the Department noted that such approval would allow the carriers "to operate more efficiently and to provide better service to the U.S. traveling and shipping public, and would allow American to compete more effectively with other carriers and alliances in U.S.-Canada transborder markets." Order 96-5-38 at 2. The Department further noted that its approval of the alliance would "be consistent with our policy of facilitating competition among emerging multinational airline networks, where those networks will lead to lower costs and enhanced services for U.S. and international consumers." Id. The Department reached a similar conclusion about the pro-consumer and pro-competition benefits of multinational alliances when it tentatively decided to grant antitrust immunity to Delta's alliance with SABENA, Swissair and Austrian Airlines. There, the Department found that such "alliances... benefit consumers by increasing international service options and enhancing competition between airlines, particularly for traffic to or from cities behind major gateways." Order 96-5-26 at 19.

Like American and Canadian, United and Air Canada are requesting antitrust immunity in order to offer enhanced service to consumers and to increase their effectiveness as global competitors. If, as the Department has tentatively concluded,

approval of the American/Canadian alliance is "consistent with ... [the Department's] policy of facilitating competition among emerging multinational airline networks," Order 96-5-38 at 2, it follows a fortiori that approval of the United/Air Canada alliance would be consistent with such policy. The grant of immunity to the United/Air Canada alliance, no less than the grant of immunity to the American/Canadian alliance, will allow the carriers to increase the transborder service options available to consumers, and to enhance transborder competition with other carriers and carrier alliances, particularly for traffic moving to or from cities behind the major gateways.

III. The Antitrust Immunity Tentatively Granted The American/Canadian Alliance Will Strengthen The Parties' Ability To Develop An Integrated Global Network Notwithstandins The Exclusion Of Third-Country Markets.

In approving the American/Canadian alliance, the Department tentatively decided to deny American and Canadian antitrust immunity for coordinated activities in third-country, fifth- and sixth-freedom markets. Despite this limitation, however, the immunity granted for transborder services will greatly facilitate American's and Canadian's ability to develop an integrated global alliance that can compete efficiently for passengers traveling between the United States and third countries.

A decision by the Department not to grant similar immunity to the United/Air Canada alliance will make it more difficult for United (and Air Canada) to compete for these U.S. international passengers, and will artificially limit the number of competitive service and price alternatives available to U.S. consumers. American is already the largest U.S.-flag transborder competitor. The Department cannot, consistent with any standard of law or fairness, choose American to be the exclusive U.S. carrier to be granted antitrust immunity for an alliance with a Canadian carrier. Unless United and Air Canada have immunity comparable to that tentatively granted to American/Canadian, United and Air Canada will be placed at a serious competitive disadvantage vis-a-vis American and Canadian, and the maximum potential benefits available from inter-alliance competition will not be achieved.

The best way for the Department to ensure that its basic policy objectives are fully and fairly achieved is not to limit the grant of antitrust immunity to the American/Canadian alliance, but also to grant such immunity to the United/Air Canada alliance.

IV. United and Air Canada Are Entitled As A Matter Of Law To The Same Relief Granted To American/Canadian

The issues raised in the United/Air Canada application are no different from the issues raised in the American/Canadian application. If the transitional limitations on new service at

Montreal, Toronto and Vancouver are not an impediment to granting American/Canadian antitrust immunity, then those limitations likewise cannot be an impediment to granting United/Air Canada antitrust immunity.

In tentatively deciding to grant immunity to American/Canadian, the Department reviewed competitive conditions in a number of markets: a general transborder airline network market, the U.S.-Canada transborder market, individual city-pair markets, and behind- and beyond-gateway markets. See Order 96-5-38 at 18. As to the transborder alliance network market, the Department noted that "the rapid growth and development of international airline alliance networks requires an additional perspective on competitive impact -- the perspective of more broadly defined open aviation markets (in this case, the U.S.-Canada transborder market) in which travelers have multiple competing options for reaching destinations over multiple intermediate points." Order 96-5-38 at 17. With respect to this airline network alliance market, the Department concluded that "a significant element in antitrust analysis is the extent to which facilitating airline integration (through antitrust immunity or otherwise) can enhance overall competitive conditions." Id.

As for the American/Canadian alliance, the Department found that:

> Our analysis indicates that this alliance will have a strong pro-competitive impact,

> bringing on-line service to nearly 20,000 transborder city-pair markets with an estimated traffic of over 9 million passengers. In particular, the alliance will significantly increase competition and service opportunities for many of the 4 million U.S.-Canada passengers in behind-U.S. gateway and beyond-Canadian gateway markets ... This analysis further supports our belief that these alliances will benefit consumers by increasing U.S. -Canada service options and enhancing competition between airlines, particularly for traffic to or from cities behind or beyond major gateways for transborder service. U.S. consumers and airlines should be major beneficiaries of this expansion and the associated increase in service opportunities.

Id. Footnote omitted.

The United/Air Canada alliance will have an equally strong pro-competitive impact, bringing on-line service benefits to tens of thousands of transborder city pairs, and benefitting millions of passengers. A grant of antitrust immunity to United/Air Canada is as essential to the securing of these benefits as is the grant of antitrust immunity to American/Canadian.

As for the other transborder markets the Department analyzed in tentatively deciding to grant antitrust immunity to American/Canadian, United and Air Canada demonstrate in the joint application they are filing today that a decision to grant them antitrust immunity, subject to conditions comparable to those imposed on American/Canadian, will not significantly reduce

competition. In the U.S.-Canada transborder market, for example, American/Canadian combined have a 24.5% market share; United/Air Canada combined will have a market share of 34.9%. Order 96-5-38 at 18. Even though United/Air Canada will hold a somewhat higher market share than American/Canadian, they will hold a significantly lower share of the transborder market than KLM held of the U.S.-Netherlands market at the time the Department decided to grant antitrust immunity to the Northwest/KLM alliance, or than Austrian Airlines, SABENA, or Swissair held of the U.S.-Austria, U.S.-Belgium, or U.S.-Switzerland markets, respectively, at the time the Department tentatively decided to grant immunity to the Delta/SABENA/Austrian/Swissair alliance. Thus, a decision to grant United/Air Canada antitrust immunity is fully supported by prior Department precedent despite the fact that United/Air Canada would have a somewhat higher share of the transborder market than would American/Canadian.

It is a well-settled principle of administrative law that similarly situated supplicants are entitled to similar relief. See, e.g., Doubleday Broadcasting, Inc. v. Federal Communications Commission, 655 F.2d 417, 423 (D.C.Cir. 1981). ("We think... that by disregarding [its own] precedents the Commission.. .has acted arbitrarily and capriciously. The Commission may not decide a case one way today and a substantially similar case another way tomorrow, without a more

reasonable explanation than is offered here.")[2/] Therefore, United and Air Canada are entitled, as a matter of law, to the **same** relief the Department has decided to grant to American/Canadian, to Delta/SABENA/Swissair/Austrian, to KLM/Northwest, and to United/Lufthansa.

V. Unless The Department Is Prepared To Grant Immunity To United/Air Canada, Ashbacker Principles Require Contemporaneous Consideration Of The Two Applications

If, notwithstanding the substantial evidence to the contrary, the Department were to conclude that its grant of antitrust immunity to American/Canadian could in any way cause it to take a less favorable position on the United/Air Canada application, then the final order on the American/Canadian alliance should be deferred until the Department has completed its review of the United/Air Canada application. Even though the Department's tentative findings in this proceeding fully support **a** finding that the grant of antitrust immunity to both alliances would be consistent with the public interest and would not substantially lessen competition, if the Department has any question about that conclusion, it must give contemporaneous consideration to both applications.

[2/] See also BMW of North America, Inc. v. Ira Gore, Jr., 64 U.S.L.W. 4335, 4343 (U.S. May 20, 1996) (No. 94-896) (Breyer, J concurring) ("...[T]he uniform general treatment of similarly situated persons . . . is the essence of law itself.").

Due process requires the Department to give contemporaneous consideration to applications that may be mutually exclusive. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). In order for the Ashbacker doctrine to be applicable, a party need not show that the granting of one license would preclude granting of the other,[3/] but only that there is a likelihood that its own application will be substantially affected. See e.g., WLVA, Inc. v. FCC, 459 F. 2d 1286, 1303 n. 60 (D.C. Cir. 1972).[4/] So long as the Department is prepared to grant both the United/Air Canada and American/Canadian applications subject to substantially similar terms and conditions, Ashbacker principles do not require contemporaneous consideration. However, if the Department concludes that a decision to grant the American/Canadian application changes its analysis in a manner that might cause it to deny the United/Air Canada application either in toto or with respect to certain categories of passengers in one or more city pairs, or to impose

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[3/] The Administrative Procedure Act ("APA") defines a "license" to include "the whole or a part of any agency approval or other form of permission ...." 5 U.S.C. §551(8). A license is generally understood to be a grant by a government authority or agency of a right to engage in conduct that would be improper without such grant. See Stein, Mitchell, Mezines Administrative Law at ¶41.04. An order of the Department granting American/Canadian immunity from the antitrust laws is a license for APA purposes and is, therefore, subject to Ashbacker requirements.

[4/] In order for the Ashbacker principle to apply, a claimant need not show complete exclusivity, but only that the grant of another application is likely to affect substantially the outcome of its own application. Id. See also Delta Air Lines, Inc. v. CAB, 275 F. 2d 632 (D.C. Cir. 1959), cert. denied sub nom. Eastern Airlines, Inc. v. CAB, 326 U.S. 969 (1960).

materially different conditions on its approval of United/Air Canada, Ashbacker and its progeny require the Department to give the applications contemporaneous consideration.

United notes in this regard that the Department has tentatively decided to exclude from the immunity to be granted to American/Canadian certain activity of the parties related to some categories of U.S. point of sale passengers in the New York-Toronto market. The Department did not, however, impose any conditions on the immunity granted American/Canadian for similar activities in the Chicago-Toronto market, even though American is the largest carrier in the market and maintains a major hub at Chicago's O'Hare Airport.[5/] See Order 96-5-38 at 19.

Like American and Canadian, United and Air Canada both provide nonstop service between Chicago and Toronto. If American and Canadian are to be granted antitrust immunity without any limitations on pricing and yield management activities in this city pair, fundamental fairness requires that United and Air Canada also be granted such immunity. And, if the Department believes that the granting of immunity to both alliances could affect its analysis regarding the Chicago-Toronto market such that it would limit the antitrust immunity granted to United/Air Canada, Ashbacker principles require that it either withhold

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[5/] The Department does not discuss in Order 96-5-38 the fact that American and Canadian also provide overlapping nonstop service in the Toronto-Tampa market.

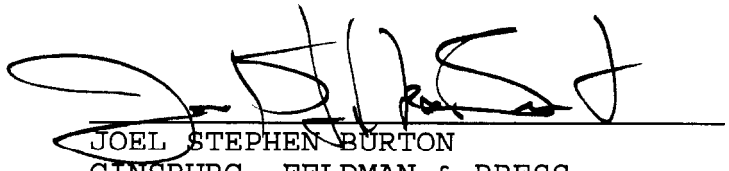
immunity from both alliances for pricing related activity in the Chicago-Toronto market, or consider contemporaneously whether to grant such immunity to either alliance. Any other result would deny United due process.

* * * * *

At issue in this proceeding is not simply the future of a single inter-carrier alliance, but the scope of future competition in the transborder market -- a market the Department itself has described as the "largest international passenger market in the world." Order 96-5-38 at 10. Both United and American are attempting to increase the scope and efficiency of their transborder services through integrated alliances with Canadian carriers. The grant of antitrust immunity to both alliances will significantly expand the services options available to consumers and greatly increase competition in transborder markets. A decision limiting immunity to the American/Canadian alliance, on the other hand, would be inconsistent with the Department's policy of promoting inter-alliance competition, preclude United from expanding its global alliance network to Canada, limit transborder competition, deny United due process, and fail to promote the public interest. To

avoid these adverse results, both alliances should be granted immunity.

Respectfully submitted,



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DATED: June 4, 1996

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Comments of United Air Lines, Inc. to the persons on the attached Service List by causing a copy to be sent via first class mail, postage prepaid.

/s/ Kathryn D. North
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DATED: June 4, 1996

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